

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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BRIEF FOR APPELLANT AND JOINT APPENDIX

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT *For the Court of Appeals*

For the District of Columbia Circuit

No. 12,828

SEP 14 1955

ALONZO O. BLISS, JR., *Appellant*

v.

JAMES McD. SHEA, and NATIONAL SAVINGS AND
TRUST COMPANY, as Executors and Trustees,
EDITH BENNIE BLISS, et al., *Appellees*.

On Appeal from a Final Order of the United States District
Court for the District of Columbia

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STATEMENT OF QUESTION PRESENTED

The question is whether one or more provisions of Item III (a trust) of the Will violate the Rule against Perpetuities, and, consequently, whether Appellant, as an heir at law and a next of kin, is entitled to his intestate share in the trust estate.

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IN THE

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,828

ALONZO O. BLISS, JR., *Appellant*,

v.

JAMES McD. SHEA, and NATIONAL SAVINGS AND TRUST COMPANY, as Executors and Trustees named in the Will of Arthur L. Bliss, Deceased, EDITH BENNIE BLISS, CLARENCE G. BROWN, his wife HELEN BROWN, and their minor child, KINGMAN BROWN, DEAN E. BROWN, JR., his wife ALLISON BROWN and their minor children DEAN E. BROWN, III and TRAVIS BROWN, KATHERINE B. RICHARDSON, MRS. MARCIA B. LAY, and NATIONAL SAVINGS AND TRUST COMPANY, as Trustee of the Alonzo O. Bliss Properties, *Appellees*.

On Appeal from a Final Order of the United States District Court for the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a final order of the United States District Court for the District of Columbia dated June 8,

1955 (App. 15-16),¹ denying plaintiff's motion for summary judgment (App. 10) and granting the motion of the defendants for judgment on the pleadings (App. 14). The notice of appeal was filed on June 30, 1955 (App. 18; R. 27).

This proceeding was instituted by Alonzo O. Bliss, Jr., a resident of Miami, Florida, for the construction of a testamentary trust created in the will of his half-brother, Arthur L. Bliss, a resident of the District of Columbia who died testate on or about May 27, 1953 (App. 2-10). The will involved was admitted to probate by the United States District Court for the District of Columbia in proceedings at Administration No. 82993 (App. 3, 13).

Jurisdiction of the cause was conferred on the District Court by the Act of February 27, 1877, c. 69, § 2, 19 Stat. 253; as amended by the Act of March 3, 1901, c. 854, 31 Stat. 1199, 1200, Act of June 25, 1948, c. 646, § 39, 62 Stat. 992, Act of May 24, 1949, c. 139, § 135, 63 Stat. 108 (District of Columbia Code (1951), §§ 11-305, 11-306).

The jurisdiction of this Court is invoked under §§ 1291 and 1294 of the Act of June 25, 1948, c. 646, 62 Stat. 869, 929, 930, as amended by the Act of October 31, 1951, c. 655, 65 Stat. 726, 727 (U.S.C.A., Title 28, §§ 1291 and 1294).

STATEMENT OF CASE

This case concerns the construction of the Will of Arthur L. Bliss (App. 5-9), who died May 27, 1953, a citizen of the United States and a resident of the District of Columbia (App. 2, 12). The Appellant, Plaintiff below, is not a named beneficiary of the Will, but is a half-brother of the testator and, therefore, an heir and next of kin of the deceased under the intestacy laws of the District of Columbia (App. 2, 12).

There are no factual issues; there is no evidence to weigh. The case is solely a problem in future interests:

¹ References preceded by "App." are to the Joint Appendix; those preceded by "R." are to the certified transcript of record.

Does the Will violate the Rule against Perpetuities as it exists in the District of Columbia, and, if so, does Appellant share in the estate along with his half-sister and niece who are the only other heirs and next of kin not specifically named as beneficiaries.

The Will (App. 5-9) can be conveniently summarized. It is divided into three Items. Item I provides for debts and funeral expenses; Item II gives chattels personal outright to the widow; it is Item III, an elaborate trust, that presents the difficulty. This Trust bequeaths:

(a) An equitable life estate only in all of the Trust property to the testator's widow;

(b) Remainders to two named nephews, if they survive the testator's widow. The litigants are not in agreement as to whether the limitations to these nephews are (i) contingent remainders; (ii) vested remainders. The Court below characterized these interests merely as "remainders" (App. 15); and

(c) Equitable remainders to other beneficiaries, some of whom are not or may not be in being as of the date of testator's death, who are to receive the bounty in the event the nephews do not survive the widow. These subsequent and alternative takers are widows of the nephews, issue of the nephews, and an existing Trust known as the Alonzo O. Bliss Properties. As will appear in later discussion, some of these subsequent takers are to receive (if they take at all) life interests; others are to receive interests in fee. In order to take, they must survive specified persons and events.

STATUTES INVOLVED

The pertinent statutes are set forth in Titles 18 and 45 of the District of Columbia Code (1951). The statutory language is as follows:

§ 18-701. *Distribution—When to be made.*

When the debts of an intestate, exhibited and proved or notified and not barred, shall have been discharged or settled, or allowed to be retained for as herein directed, the administrator shall proceed to make distribution of the surplus as follows: (Mar. 3, 1901, 31 Stat. 1249, ch. 854, § 373.)

§ 18-704. *When surviving spouse entitled to one-half.*

If there be a widow or surviving husband and no child or descendants of the intestate, but said intestate shall leave a father or mother, or brother or sister, or child of a brother or sister, the widow or surviving husband shall have one-half. (Mar. 3, 1901, 31 Stat. 1249, ch. 854, § 376; Apr. 19, 1920, 41 Stat. 563, ch. 153.)

§ 18-705. *Distribution of surplus after payment to surviving spouse.*

The surplus, exclusive of the widow's or surviving husband's share, or the whole surplus (if there be no widow or surviving husband), shall go as follows: (Mar. 3, 1901, 31 Stat. 1250, ch. 854, § 377; Apr. 19, 1920, 41 Stat. 563, ch. 153.)

§ 18-709. *Share of brother or sister or their descendants.*

If there be a brother or sister, or child or descendant of a brother or sister, and no child, descendant, or father or mother of the intestate, the said brother, sister, or child or descendant of a brother or sister shall have the whole. (Mar. 3, 1901, 31 Stat. 1250, ch. 854, § 381.)

§ 18-710. *Brothers and sisters to share equally.*

Every brother and sister of the intestate shall be entitled to an equal share, and the child or children, or descendants of a brother or sister of the intestate, shall stand in the place of their deceased parents respectively. (Mar. 3, 1901, 31 Stat. 1250, ch. 854, § 382.)

§ 18-715. *No distinction between whole and half-blood.*

In the distribution of personal estate there shall be no distinction between the whole and half-blood. (June 30, 1902, 32 Stat. 530, ch. 1329, § 386a.)

§ 45-102. *Perpetuities—Excepting charitable uses.*

Except in the case of gifts or devises to charitable uses, every future estate, whether of freehold or leasehold, whether by way of remainder or without a precedent estate, and whether vested or contingent, shall be void in its creation which shall suspend, or may by possibility suspend, the power of absolute alienation of the property, so that there shall be no person or persons in being by whom an absolute fee in the same, in possession, can be conveyed, for a longer period than during the continuance of not more than one or more lives in being and twenty-one years thereafter. (Mar. 3, 1901, 31 Stat. 1351, ch. 854, § 1023.)

§ 45-810. *Future estates.*

A future estate is one limited to commence at a future day, either without the intervention of a precedent estate or after the expiration or determination of a precedent estate created at the same time and by the same conveyance or devise. (Mar. 3, 1901, 31 Stat. 1351, ch. 854, § 1020.)

§ 45-811. *Remainder and conditional limitation.*

If it is to commence upon the full expiration of such precedent estate, it is a remainder and may be transferred by that name. If it is to commence on a contingency which, if it happen, will abridge or determine such precedent estate before its expiration, it shall be known as a conditional limitation. (Mar. 3, 1901, 31 Stat. 1351, ch. 854, § 1021.)

§ 45-812. *Vested and contingent future estates.*

A future estate is vested when there is a person in being who would have an immediate right to the possession of the land upon the expiration of the inter-

mediate or precedent estate, or upon the arrival of a certain period or event when it is to commence in possession. It is contingent when the person to whom or the event upon which it is limited to take effect in possession or become a vested estate is uncertain. (Mar. 3, 1901, 31 Stat. 1351, ch. 854, § 1022.)

§ 45-823. *Provisions applicable to personal property.*

All the provisions of this chapter and of sections 45-102 to 45-104, 45-203, 45-204, shall apply to personal property generally except where from the nature of the property they are inapplicable. (Mar. 3, 1901, 31 Stat. 1352, ch. 854, § 1036, as added by June 30, 1902, 32 Stat. 538, ch. 1329.)

STATEMENT OF POINTS

Appellant relies upon the points on appeal (R. 30) and the subpoints which follow as set forth below:

1. The will of Arthur L. Bliss violates the rule against perpetuities.

2. The will of Arthur L. Bliss violates the rule against suspension of the power of alienation.

(a) Paragraphs 3 and 4 of Item III of the will violate the rule against perpetuities. The Court below erred in expressly refusing to rule on this point, which is the nub of the case (App. 15-16).

(b) If Item III of the will violates the rule, then the entire trust is void. The Court erred in holding that it is not necessary to determine at this time whether the will violates the rule against perpetuities, since the interests in the widow and the nephews are valid even so.

3. The appellant has a present interest as an heir at law in the estate of Arthur L. Bliss.

4. The interest of the appellant arising from either or both paragraphs 3 and 4 above entitles the appellant to a present construction of the will under the Declaratory Judgment Act.

(a) Since Item III (the trust) is void, plaintiff has a present interest by intestacy in the assets of the invalid trust. The Court below erred in holding in effect that even though paragraphs 3 and 4 of the trust might be invalid, the plaintiff had at this time no standing to sue.

(b) If the order denying plaintiff's motion for summary judgment and granting defendant's motion for judgment on the pleadings (App. 15-16) is based on the Court's unexpressed belief that even though a trust in a will may be partly invalid, certain portions can nevertheless be upheld, the Court erred in three aspects:

(1) The Court erred in attempting to sever before deciding the question of the violation of the rule.

(2) The Court erred in severing a trust that should in its entirety be declared void because of the doctrine of infectious invalidity, the trust in question being a unified whole that must rise or fall as a single interwoven plan.

(3) The Court erred in severing the trust at all; but if severance is applicable (which we maintain it is not), the Court could logically uphold the trust only to the extent of the equitable life estate of testator's widow.

SUMMARY OF ARGUMENT

Item III of the Will under attack violates in three separate places the Rule against Perpetuities. Item III is one trust, one scheme. Since it is defective the entire trust should be held invalid.

The Court below refused to rule on the point that the trust provided for in the Will violates the Rule. It held, in effect, that, notwithstanding the possibility that latter portions of the trust might be invalid, the Appellant has no standing to sue. From this language, Appellant assumes that the Court below must have severed the trust provisions as to valid and possibly invalid portions. The Appellant contends that such a severance is premature when the

basic fact of the trust's invalidity remains undecided. The Appellant submits that if the trust provisions violate the Rule then the entire trust (Item III) is invalid.

The Appellant alternately argues that if there is to be a severance, the trust (Item III) can properly be divided only into two parts as follows:

(a) The equitable life estate for the widow; and

(b) the contingent remainders in the nephews, their spouses and descendants, and the Alonzo O. Bliss Properties trust; that the primary purpose of the trust is for the latter takers; that the contingent bequests to these latter takers clearly violates the Rule against Perpetuities; and that as a consequence Appellant is presently entitled to his share in the assets of the trust (Item III) according to his interest as a next of kin, subject to the widow's equitable life estate.

ARGUMENT

I.

THE TESTAMENTARY TRUST VIOLATES THE RULE AGAINST PERPETUITIES

The nature and application of this doctrine has been described by its most illustrious expounder in the following language:

“The Rule against Perpetuities is not a rule of construction but a preemptory command of law. It is not like a rule of construction, a test more or less artificial to determine intention. Its object is to defeat intention, therefore every provision in a Will or settlement is to be construed as if the Rule did not exist and then to the provision so construed the Rule is to be remorselessly applied.” Gray, *The Rule Against Perpetuities* (4th Ed. 1942), Section 629.

A. Statement of the Rule

The Appellant attacks a testamentary trust that violates the Rule against Perpetuities. Again using the words of Professor Gray, this Rule has been summarized as follows:

"No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." Gray, *The Rule against Perpetuities* (4th Ed. 1942), Section 191.

The Rule has long been conceded to be a vital part of the law of the District of Columbia, Code—1951 Ed. Sec. 45-102, 45-823; *Mondell v. Thom*, 79 App. D. C. 145, 143 F. 2d 157 (1944). The authors of *The American Law of Property*, (1952), Vol. VI, p. 176, with reference to the statutes in the District of Columbia, state:

" * * * there is no indication in the decisions of these jurisdictions that the statutes accomplished any substantial changes in the common law rule." See, Updegraff, *The Rule Against Perpetuities in the District of Columbia*, 14 Georgetown L. J. 336 (1926).

There can be no question that the Rule against Perpetuities is applicable in the District of Columbia with all of its common law strength and vigor.

B. The Testamentary Trust Violates the Rule in at Least Three Places

First—Sub-paragraph (a) of Paragraph 3 of Item III of the Will is in violation of the Rule. This portion of the Will provides (App. 6-7):

"Should either or both of my said nephews predecease the time hereinbefore fixed for termination of this Trust [we add: the death of Testator's widow], leaving issue who shall then survive, the share of such nephew (or the separate shares of such nephews) shall be retained by my said Trustees * * *. If such nephew shall leave a widow, my said Trustees shall thereafter remit unto such widow, one-third of the net income from the share of the Trust Fund to which such nephew would have been entitled if living, for and during the remainder of her natural life, or until her remarriage or the termination of this Trust, as is hereinafter provided."

Under this provision, a widow of a nephew may become a life beneficiary under the Will. Let us assume that the widow is not a life in being at the death of the testator; that she is born thereafter and she survives: a) her husband, who predeceases the testator's widow; and b) the other nephew; and c) the testator's widow; for more than 21 years. Under these events it is clear that a portion of the corpus ($\frac{1}{3}$ of $\frac{1}{2}$) of the Trust (set aside for the nephew's widow) will not vest or the final taker be determined, until a time later than a life or lives in being and 21 years. The Trust, in this particular alone, therefore, violates the Rule against Perpetuities. See *Loring v. Blake*, 98 Mass. 253 (1867).

Second—another provision of Sub-paragraph (a) of Paragraph 3 of Item III of the Will also violates the Rule against Perpetuities. This defective portion reads (App. 7):

“Upon the attainment of the age of *thirty years* by the youngest child (of such nephew) living at the date of my death, who shall survive to attain that age, *or upon the death of the last surviving child of such nephew prior to attaining such age, the Trust as to this share of my estate, shall terminate*, and my said Trustees shall thereupon set over, assign, transfer and convey the entire corpus of such share, together with all accrued and accumulated net income, unto the *then surviving* child or children of such nephew, and unto the issue of any deceased child or children of such nephew, in absolute estate and in fee simple, share and share alike, per stirpes and not per capita.” (Italics supplied.)

It is readily seen that a nephew may have a child or children born after the death of Testator, who thus are not lives in being; that the last surviving child may attain 21 yet die before the age of 30, leaving a child. The interests passing under the Trust to this last-born child will clearly vest later than life or lives in being and 21 years. The

Trust is again in violation of the Rule because the interest attempted to be conveyed is to one who is far too remote.

Finally—Sub-paragraph (b) of Paragraph 3 of Item III of the Will violates the Rule against Perpetuities. Should a nephew die before the life tenant, and himself leave a widow, then $\frac{1}{3}$ of this nephew's share is postponed in vesting until his widow's death, which can be more than 21 years after the death of all those in being at the date of Testator's death. The language in the Will is as follows (App. 8):

“ * * * my said Trustees shall set apart and retain one-third of the share to which such nephew would have been entitled had he survived, with all of the powers hereinbefore conferred upon them. * * * and after the death or remarriage of such widow, the retained one-third share, together with all accrued and accumulated income, as is herein provided for the share of the other of my said nephews.”

Here again the ultimate trust interest will vest in case of the widow born after the death of the Testator, in the next succeeding taker which may be later than permitted by the period of the Rule. Here again the Trust has attempted to postpone vesting beyond lives in being plus twenty-one years.

C. The Court Was in Error in Refusing to Decide the Perpetuities Question

We submit that the foregoing analysis demonstrates that the Testamentary Trust violates the Rule against Perpetuities. It logically follows that the Appellant as a next of kin should obtain a decree declaring that the Will, to the extent of the Trust (Item III), is void and awarding Appellant his share in the assets of the Trust. However, the Court in its Order (App. 15-16) expressly refused to rule on the perpetuities problem. If the Trust as a matter of law, does not violate the Rule, then Appellant's case has no merit. The cardinal point is whether

there is a violation and on this question the Court below refused to rule. The rationale of the Order below is not clear and is void of any citation of authority. In effect, the Order says that it is not necessary to determine the Perpetuities question, since Appellant has no standing to sue. Obviously, since the validity of Appellant's position depends on whether there is a violation of the Rule against Perpetuities, Appellant's standing to sue cannot be casually dismissed as if Appellant were a complete outsider. Appellant as an heir at law and next of kin has a standing in Court; his right to recover depends on the question whether the Rule has been violated. Appellant contends that his standing to sue depends on the perpetuities question; his argument has been turned into a circumlocution: which comes first, the chicken or the egg. The Court below failed to decide the principal question presented. As Professor Simes has said, this question of violation is raised at the threshold:

"For the issue as to the validity of the limitations under the Rule is generally raised before the question of construction is decided." Simes, *Handbook on the Law of Future Interests*, Hornbook Series (1951), Sec. 115, p. 400.

We urge the Court of Appeals to decide squarely the Perpetuities question and then to proceed to a determination of Appellant's property interest in the estate. This latter point requires a study of the effect of the invalidity of Item III of the Will.

II.

THE EFFECT OF THE VIOLATION

The remaining portion of this Brief is based on the assumption that the Testamentary Trust violates the Rule against Perpetuities and that the Court of Appeals will express an opinion as to the effect of the invalidity.

In determining the effect of illegal limitations, an analysis must be made of the entire testamentary scheme. One eminent jurist has expressed the matter in the following language:

“[T]he point is, does the general testamentary scheme under attack indicate a plan in which the dominant intent was not to create life estates particularly to benefit those who were to enjoy them, but to create such estates as incidental to and for the principal purpose of supporting remainders which might not vest till a time beyond that allowed by law? If so, the whole scheme fails.” Chief Justice Moschziker, *Feeney's Estate*, 293 Pa. 273, 142 Atl. 284, 290 (1928).

A. The Doctrine of Severability

Severability or separability, as it may be called, is the process by which in appropriate cases, the courts uphold some provisions of a will and destroy others. This technique, if applied, normally follows a finding that some parts of a will are invalid. If the will is entirely good, there is nothing to sever; yet if a will is partly bad, the entire will may nevertheless be set aside. The Court below, without saying so seems to have severed some of the limitations from other limitations without deciding that any limitation in fact violates the Rule.

The cases in point from the District of Columbia are few but solid. Their teaching is summarized in the *Law of American Property* (1952), Chap. VI, p. 350.

“The invalidity of ultimate limitations does not result in the destruction of prior valid interests (citing *Hazen v. American Security and Trust Co.*, 49 App. D. C. 297, 265 Fed. 477 (1920)), but the Courts have not been particularly favorable to the separation of invalid from valid parts of a trust or other dispositions and the preservation of the valid parts. (Citing *Wills v. Maddox*, 45 App. D. C. 120 (1916), Cert. denied 242 U. S. 640 (1916). *Mondell v. Thom*, 79 App. D. C. 145, 143 F. 2d 157 (1944). Cf. *Landram v. Jordan*, 203 U. S. 56 (1906).) (Italics supplied.)

The quotation points out a dichotomy that is useful in the case at bar. Item I and Item II of the Will are completely separate as to content, phrasing, placement, and intent. They should, of course, be severed from Item III, which is a Trust, unconnected with the subject matter of Items I and II. By the same token, Item III cannot be separated into the valid and the invalid, since Item III is all one Trust, all one scheme.

B. The District of Columbia Cases

We proceed from the general rule to the particular District cases.

1. *Wills v. Maddox*. The reasoning in *Wills v. Maddox*, 45 App. D. C. 128 (1916), supports Appellant's position. There, life estates were followed by vested remainders in fee (possession to be deferred until the vested remaindermen attained the age of 25). The Court found that all interests would vest within the time permitted by the Rule and that only enjoyment was postponed. The Court went on to say that had there been a violation of the Rule, then the Court would have invalidated both the preceding life interests and vested remainders. Mr. Justice Robb who delivered the opinion quoted with approval from *Knox v. Jones*, 47 N. Y. 389, a pertinent New York case, as follows:

"The whole trust was held invalid on the ground that there was but a single trust providing for all the beneficiaries and embracing all in a common purpose
* * *

* * * Clearly if the gift over to the children of the surviving brother is bad for remoteness, it will carry with it the entire scheme. That same is true of the life interests of the nephews. They were a part of the general scheme, and not the most important part at that."

In short, *Wills v. Maddox* asserts that a trust will fail, in all of its aspects, including vested life estates, if, in

fact, the trust violates the Rule. The Bliss Trust violates the Rule in three instances. The rationale of *Wills v. Maddox* applied to the Trust (Item III) of the Bliss Will compels its destruction.

2. *Landram v. Jordon*. Another case, *Landram v. Jordon*, 25 App. D. C. 219, affirmed 203 U. S. 56 (1906), which preceded *Wills v. Maddox*, is a decision squarely in Appellant's favor. This case shows the application of the doctrine of severability at its best.

The beneficiaries in the *Landram* case under the trust all partook of one scheme; the niece partook of another. The Court of Appeals separated only a minor gift to the niece that involved a distinct piece of property, separate from the assets of the major trust, limited to the niece under a different clause of the Will and only incidentally tied in with the trust provisions.

The appeal to the Supreme Court urged error only on the point that the District of Columbia Courts should also have destroyed the niece's interest. The point was never seriously raised that the niece's trust interest should be severed; its entire destruction was acquiesced in by all parties and sanctioned by these Courts. Actually, the Court essentially destroyed the entire trust, as being one scheme, a part of which violated the Rule. Comparing this case with the Bliss case at bar, we grant the logic in severing Item I and Item II of the Will (the non-trust items) from Item III (the Trust). We urge, however, that Item III, one Trust, one scheme, cannot be severed.

3. *Hazen v. The American Security and Trust Co.* Appellees rely upon *Hazen v. The American Security and Trust Co.*, 49 App. D. C. 297, 265 F. 447 (1920). This case is easily distinguished. The key to that case is that the Court of Appeals was confronted with a *fait accompli*. The testator died in 1901, the appellate decision was delivered in 1920. In the *Hazen* case there were two successive

life holders, the widow and an adopted daughter. The next limitation was to the daughter's children, and their limitation was followed by a limitation to heirs of these children. When suit was brought in 1917, the widow who had inherited a life estate had died, the succeeding life tenant, the adopted daughter, had also died and subsequent limitations to the daughter's children had become fixed. The Court severed these interests from a remote invalid limitation to "heirs" of the daughter's children, citing *Landram v. Jordon*. We have seen that in *Landram v. Jordon*, the major trust was completely destroyed; so the doctrine of infectious invalidity was by no means overruled. Factually, the *Hazen* case differs from the others we have discussed and from the case at bar. The dominant plan to protect the adopted daughter and her children could be upheld and separated from the invalid limitation to the "heirs". There was a plan for the adopted daughter and her children together with another scheme for the "heirs". But in the Bliss Will (at bar) there is a scheme for the testator's widow, followed by a dominant scheme to nephews, widows of nephews and the nephews' children. Although one might conceivably sever the minor plan which provides a life tenancy for testator's widow from the major plan which attempts to dispose of the fee, it is submitted that the doctrine of separability, if applicable at all, should not and logically cannot be applied to sever certain of the Trust provisions in the major scheme of distribution from other provisions in the same major scheme.

4. *Mondell v. Thom*. Another case from the District of Columbia that supports Appellant's position is *Mondell v. Thom*, 79 App. D. C. 145, 143 F. 2d 157, 158 (1944). This case involved a violation of the Rule against Perpetuities with the additional feature of a power of appointment. Judge Edgerton destroyed a life estate that would otherwise have been valid and said: "We agree with the District Court that the interests which the Will attempted to

create were too intimately connected to be severable." This result represents the orthodox, classical position in the District. Accordingly in the Bliss case before the Court, the widow's life estate and the subsequent limitations ought all to be destroyed; they are all ultimately connected; all a part of a single trust.

5. *Lewis v. Cockrell*. The last major opinion in the reports from the District on point is *Lewis v. Cockrell*, 80 F. Supp. 380 (1948). The Court found that a will was subject to two possible constructions, under one of which the will would be upheld and under the other it would be set aside. It chose the construction that kept the will from violating the Rule against Perpetuities. The opinion also recognizes that in a case, *where there can be no alternative construction*, the Rule must then be applied. Such is the Bliss case; there is no possibility of an alternative construction. Had the Rule been applied in the *Lewis* case, the corpus of the trust would have failed. The case, therefore, while not completely relevant to the issues presented herein, adds weight to the case law of the District of Columbia that (a) courts will dodge the point of a possible violation of the Rule; and (b) courts will apply the Rule if the language of the Will requires it.

We submit that the failure of the Court below to decide on whether the trust violated the Rule was substantial error. In the *Lewis* case the Court clearly faced the issue, realized that the trust would have to be set aside if it violated the Rule, but was able to construe the language of the will to preclude any violation of the Rule. The *rationale* of the *Lewis* case supports Appellant's position as to infectious invalidity once a violation of the Rule is established.

C. The Plan of Testator

Since the cases just reviewed from the District of Columbia evidence a strong tendency to destroy a trust that in part violates the Rule, if the trust is all of one scheme,

it is appropriate to examine the scheme which testator had in mind in setting up the Bliss Trust in Item III (App. 6-8). He wished first to give his wife a life interest in the trust, a share considerably less than the one-half portion to which she would be entitled were the trust assets to pass as intestate property. The major object of the trust then follows: to pass on the corpus to survivors of the testator's widow, preferably to the nephews, their widows and descendants, but expressly only to those who survive the testator's widow. Future survivorship of the ultimate takers, the nephews, their widows and finally their issue, is the important point. The distinction we seek to make here is that the gift to the nephews cannot be severed from the gift to the nephews' widows or descendants, all of whom are as particularly described as possible. This is no trust as in *Hazen v. American Security and Trust Co.*, 49 App. D. C. 297, 265 Fed. 447 (1920), where the analogous gift to the nephews there is followed by a gift over to "heirs" as they may be determined by statutes of descent. Rather, here, should the gift to the nephews fail because of their failure to survive testator's widow, the particular takers are precisely described, and all are conditioned on survivorship or the attainment of specified ages or both.

If the trust is one complete scheme, as we have pointed out, then it makes no difference how the nephew's remainders are further characterized, whether as contingent or vested. However described, these remainders, which if standing alone would be valid, must fail along with the invalid portions of the Trust, as integral parts of an invalid scheme. But the further characterization of these remainders of the nephews throws light on the determination of whether they are a part of an invalid scheme or whether they can be left to stand alone. It is Appellant's conviction that these remainders to the nephews are contingent remainders; that the invalid remainders are alternative contingent remainders; and that the fact that

the testator imported contingency to all of these limitations indicates that he was thinking of them as a "package plan". *Mondell v. Thom*, 79 App. D .C. 145, 143 F. 2d 157, 158 (1944); *Feeney's Estate*, 293 Pa. 273, 142 Atl. 284 (1928); *Lawrence v. Smith*, 163 Ill. 149, 45 N. E. 259 (1896).

D. The Limitations to the Nephews Are Contingent Remainders

The Will reads in pertinent part (App. 6):

"Upon the death of my said wife * * * the Trust hereby established shall terminate, and my said Trustees shall thereupon set over, assign, transfer and convey the corpus thereof, together with all accrued and accumulated income, in absolute estate and in fee simple, one-half thereof unto [x] and one-half thereof unto [y]; provided, however, should either of my said nephews die prior to the time herein fixed for termination of this Trust, leaving neither issue nor a widow who shall survive the termination of this Trust, my said Trustees shall thereupon set over, assign, transfer and convey the entire corpus thereof, together with all accrued and accumulated income, in absolute estate and in fee simple, unto the other of them."

Professor Leach in his case book on the *Law of Future Interests*, 2nd Ed. (1940), page 255, points out:

"* * * remainders which are subject to a condition precedent and all executory interests are contingent in the sense they are not vested in interest."

The language of Paragraph III above, creates a condition precedent to the vesting of the corpus in the nephews, the condition being that they survive the widow. Gray's definition reaches the same result, namely, that the remainders limited to the nephews are contingent.

"A remainder is vested in A, when throughout its continuance, A or A and his heirs, have the right to immediate possession whenever and however the preceding freehold estate may determine or a remainder

is contingent if in order for it to come into possession the fulfillment of some conditions precedent other than the determination of the preceding freehold estates is necessary." Gray, *The Rule Against Perpetuities*, (3rd Ed.), Sec. 100. (Italics supplied.)

That survivorship imports contingency see *Molter v. Commissioner of Internal Revenue*, (7 Cir.), 69 F. 2d 7, 9 (1934). There Judge Sparks wrote:

"Of course, if survivorship, or other conditional element is incorporated in the gift or into the designation of the remainderman, such as to such children as survive a certain time, the remainder will be contingent and the vesting thereof deferred. This is not only true with respect to Illinois * * * but the rule is quite generally adhered to throughout the United States. Those cases are rightly based on the theory that survival in such cases is made a condition precedent."

Kales wrote, in *Estate, Future Interests and Illegal Conditions and Restraints in Illinois*, (1920), Sec. 309, p. 326:

"Perhaps the commonest example of the contingent remainder is where after a life estate an interest is limited to individuals, or to a class, provided they survive the life tenant."

In this connection see also the opinion in *Lewis v. Cockrell*, 80 F. Supp. 380 (1948).

It is readily seen here that the nephews have no interest, unless the nephews personally and actually survive the widow of the testator. The Trust does not provide that the corpus shall pass to the Nephews and their heirs, upon the death of the widow. Instead, it provides that the nephews shall receive only if they survive the testator's widow; and if they do not survive the testator's widow, they and their heirs get nothing. The limitation to the nephews, being subject to something more than the destruction of the life estate, *i. e.* actual survival by one or both of them, is therefore a contingent remainder.

E. The Failure of the Trust

Recapitulating, the testator gave a vested remainder to his widow followed by a series of contingent remainders to others. If the Court severs at all, it is submitted that the logical place to sever is at the point between the widow's life estate and the contingent limitations that follow. The result of such a severance would be to give an immediate reversion in fee to the next of kin of the testator, including Appellant; and since all reversions are vested, Leach, *Cases and Materials on Future Interests*, (2nd Ed. 1940), p. 2, the Appellant would be able to alienate, sell, and protect his share of the fee.

We urge, however, that the provisions of the Trust should not be severed at all but that the entire Trust (Item III) should be declared void, including the widow's vested life estate. The dominant intent of the testator concerned the corpus. If it is declared void the preceding life estate should fall with it. As put by *The American Law of Property*, Vol. VI, p. 128:

"On the other hand, if the holders of the valid life estates are also the persons who would take the property if all interests are stricken down, it may well be that the invalidity of the remainders has so destroyed the essential purpose of the Testator or Settlor that there is no point in retaining the life estate."

It should be emphasized in this connection that no harm would be done to testator's widow who would receive one-half of the Trust outright if the property passes by intestacy. There appears to be no reason or justification for retaining the life estate.

CONCLUSION

Appellant submits that Item III of the Will here involved violates the Rule against Perpetuities and must therefore be set aside. It necessarily follows that the Trust property passes by intestacy. The order of the District Court

should be reversed with directions to grant Appellant's Motion for Summary Judgment.

Respectfully submitted,

LEE C. ROBINSON,
212 Pan American Bank
Building,
Miami 32, Florida

SCOTT P. CRAMPTON,
815 Fifteenth Street, N. W.
Washington 5, D. C.
Attorneys for Appellant

September, 1955

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,828

ALONZO O. BLISS, JR., *Appellant*

v.

JAMES McD. SHEA, et al., *Appellees*

Appeal from the United States District Court
for the District of Columbia

JOINT APPENDIX

1 IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Filed Jan. 11, 1955

Civil Action No. 130-'55

ALONZO O. BLISS, JR., 2585 South Bayshore Drive,
Miami, Florida, *Plaintiff*,

v.

JAMES McD. SHEA, 3615 Macomb Street, N. W., Washington D. C., and NATIONAL SAVINGS AND TRUST COMPANY, Fifteenth Street and New York Avenue, N. W., Washington D. C., as Executors and Trustees named in the Will of Arthur L. Bliss, Deceased, EDITH BENNIE BLISS, 2311 Connecticut Avenue, N. W., Washington, D. C., CLARENCE G. BROWN, his wife HELEN BROWN, and their minor child, KINGMAN BROWN, all of 2702 Wisconsin Avenue, N. W., Washington, D. C., DEAN E. BROWN, JR., his wife ALLISON BROWN and their minor children DEAN E. BROWN, III and TRAVIS BROWN, all of 6401 Connecticut Avenue, Chevy Chase, Maryland, KATHERINE B. RICHARDSON, 1650 Harvard Street, N. W., Washington, D. C., MRS. MARCIA B. LAY, 1707 Columbia Road, N. W., Washington, D. C., and NATIONAL SAVINGS AND TRUST COMPANY, Fifteenth Street and New York Avenue, N. W., Washington, D. C., as Trustee of the Alonzo O. Bliss Properties, *Defendants*.

Complaint for Declaratory Judgment

Comes now the Plaintiff in this cause and alleges that:

1. Arthur L. Bliss, half-brother of the Plaintiff ALONZO O. BLISS, JR., died testate on or about May 27, 1953, a citizen of the United States and a resident of the District of Columbia.

2. Said Arthur L. Bliss left surviving him as his sole heirs at law and next of kin, his widow, EDITH BENNIE BLISS, and the following, all of whom are of full age:

Marcia Bliss Lay, sister, of Washington, D. C.

Plaintiff Alonzo O. Bliss, Jr., half-brother, of Miami, Florida.

- 2 Katherine B. Richardson, Clarence G. Brown and Dean E. Brown, of Washington, D. C., Children of Bertha Bliss Brown, a deceased sister of said Arthur L. Bliss.

3. Said Arthur L. Bliss left a Last Will and Testament dated May 16, 1949, which has been filed in the United States District Court for the District of Columbia holding a Probate Court, Administration No. 82993, a true copy of which is attached hereto and made a part hereof.

4. According to the Petition for Probate filed by James McD. Shea and the National Savings and Trust Company, said Arthur L. Bliss at the time of his death was possessed of certain personal property consisting of bonds, stocks, automobiles and cash of the approximate value of \$186,000.00, but this Plaintiff alleges that this valuation is grossly underestimated, and that said decedent left a gross estate having a value in excess of \$600,000.00.

5. Paragraphs 2, 3 and 4 of ITEM THREE of said Last Will and Testament violate the rule against perpetuities in effect as the law of the District of Columbia in that a trust is provided that may last, without vesting, for more than 21 years after the death of the last survivor of the beneficiaries provided for in said Last Will and Testament of Arthur L. Bliss who were in being at the time of his death, and in that there is no provision for the vesting of the corpus of the Trust Estate provided for in said Will within the period permitted for such vesting.

6. Paragraphs 2, 3 and 4 of ITEM THREE of said Last Will and Testament violate the District of Columbia Code (1951) Sections 45-102 and 45-823, in that a trust is provided for that may last without vesting for more than 21 years after the death of the last survivor of the beneficiaries provided for in said Last Will and Testament of Arthur L. Bliss who were in being at the time of his death and there may be no vesting of the Trust corpus within the period when there must be a vesting to

3 have a lawful suspension of the power of alienation.

7. Paragraph 4 of ITEM THREE of said Last Will and Testament provides for the distribution under certain circumstances of the entire corpus of the Trust Estate, together with all accrued and accumulated income "unto the Trustees of the Alonzo O. Bliss Properties, as an addition to the said Trust, provided, however, that so long as the widow of either of" the nephews of said decedent "shall survive, this shall not operate to terminate the provision hereinbefore made for her or their benefit". Said provision may require distribution of the corpus and accumulated income of this Trust Estate to a non-existent beneficiary with no gift over and is therefore void under the laws of the District of Columbia.

8. As the provisions of ITEM THREE of the Will of said Arthur L. Bliss violate the laws of the District of Columbia, the Trust attempted to be set up by said Will is entirely void and all of the property disposed of by ITEM THREE of said Will is intestate property and is the property of the heirs of said Arthur L. Bliss, in the proportions prescribed by the intestate laws of the District of Columbia.

WHEREFORE, the Plaintiff prays that this Court will declare ITEM THREE of the Last Will and Testament of said Arthur L. Bliss entirely void and direct the distribution of the property disposed of thereunder forthwith to the heirs at law and next of kin of said Arthur L. Bliss.

LEE C. ROBINSON

Lee C. Robinson

212 Pan American Bank Building

150 S. E. Third Avenue

Miami 32, Florida

SCOTT P. CRAMPTON

Scott P. Crampton

934 Bowen Building

Washington 5, D. C.

Attorneys for Plaintiff

Filed Jan. 11, 1955

**The Last Will and Testament of
Arthur L. Bliss**

I, ARTHUR L. BLISS, of the City of Washington, in the District of Columbia, do make, publish and declare this my last Will and Testament, hereby revoking and annulling all Wills, Testaments and Codicils by me at any time heretofore made.

ITEM ONE. I direct the payment of all my just debts and funeral expenses in such amount as my Executor may consider desirable regardless of any restriction imposed by law, as soon after my death as may be convenient.

ITEM TWO. I give and bequeath all my wearing apparel, jewelry, automobiles, sporting equipment, furniture and furnishings whatsoever and wheresoever the same may be, unto my wife, Edith Bennie Bliss, to do with as she may wish.

ITEM THREE. All the rest, residue and remainder of my estate, real, personal or mixed, of whatsoever nature or wheresoever the same may be situated, including all property which I may hereinafter acquire or which I may die seized or possessed, or over which I may have a power of appointment I hereby give, devise and bequeath unto James Mc D. Shea and the National Savings and Trust Company, or the survivor of them in and upon the following uses and trusts:

1. To possess, hold, manage, rent or lease the said trust estate, collecting the income therefrom and to sell at public auction or private sale, or mortgage the whole or any part thereof at any time in their discretion, or in the discretion of the survivor, either for the purpose of investment or reinvestment upon similar trusts as herein set forth, for final disposition or otherwise, with full power and authority to said Trustees or the survivor, to make, execute and deliver good and sufficient deeds, deeds

5 of trust, mortgages or bills of sale conveying said property, or any part thereof, the purchaser or purchasers or persons or corporations lending money being hereby relieved from seeing to the proper application of the purchase money or money loaned, said Trustees, or the survivor, being authorized in their discretion to continue to hold investments made by me without liability for any loss occasioned by such holdings, and to invest and reinvest the funds comprising this estate in such stocks, bonds, notes, real estate or other property as they shall in their discretion, or in the discretion of the survivor, deem proper and suitable for the investment of trust funds, without being restricted to the class of investment to which a Trustee may be limited by law.

2. To pay over from time to time the net amount of rents, interest and income produced by the Trust Fund hereby established unto my wife Edith Bennie Bliss during her natural life.

3. Upon the death of my said wife, Edith Bennie Bliss, the Trust hereby established shall terminate, and my said Trustees shall thereupon set over, assign, transfer and convey the corpus thereof, together with all accrued and accumulated income, in absolute estate and in fee simple, one-half thereof unto my nephew, Clarence G. Brown, and one-half thereof unto my nephew, Dean E. Brown, Jr.; PROVIDED, HOWEVER, should either of my said nephews die prior to the time therein fixed for termination of this Trust, leaving neither issue nor a widow who shall survive the termination of this Trust, my said Trustees shall thereupon set over, assign, transfer and convey the entire corpus thereof, together with all accrued and accumulated income, in absolute estate and in fee simple, unto the other of them.

(a) Should either or both of my said nephews predecease the time hereinbefore fixed for termination of this Trust, leaving issue who shall then survive, the share of

such nephew (or the separate shares of such nephews) shall be retained by my said Trustees, with all of the powers hereinbefore conferred upon them. If such nephew shall leave a widow, my said Trustees shall thereafter remit unto such widow, one-third of the net income from the share of the Trust Fund to which such nephew would have been entitled if living, for and during the remainder of her natural life, or until her remarriage or the termination of this Trust, as is hereinafter provided. My said Trustees shall use and apply so much of the remainder such income or so much of the entire income if there be no widow, as in their sole discretion may seem desirable, for the adequate support, maintenance, education and well being of the child or children of such nephew, with full power to remit a part or all of such income to such child or children. My said Trustee shall be under no obligation to expend equal amounts for each of such children, should there be more than one, but rather shall provide for them in accordance with their respective needs. Upon the attainment of the age of thirty years by the youngest child (of such nephew) living at the date of my death, who shall survive to attain that age, or upon the death of the last surviving child of such nephew prior to attaining such age, the Trust as to this share of my estate, shall terminate, and my said Trustees shall thereupon set over, assign, transfer, and convey the entire corpus of such share, together with all accrued and accumulated net income, unto the then surviving child or children of such nephew, and unto the issue of any deceased child or children of such nephew, in absolute estate and in fee simple, share and share alike, per stirpes and not per capita.

(b) Should either of my said nephews predecease the time fixed in Paragraph 3 hereof for termination of this Trust, leaving a widow, but no issue or if at the time fixed for distribution in Paragraph (a) hereof, a widow of the nephew as to whose share provision is therein made should survive, but the issue of such nephew should then be ex-

tinct, my said Trustees shall set apart and retain one-third
 of the share to which such nephew would have been
 7 entitled had he survived, with all of the powers here-
 inbefore conferred upon them, and my said Trustee
 shall remit the net income from this portion of my Trust
 Estate unto such widow, for and during the term of her
 natural life, or until she remarries; My said Trustees
 shall set over, assign, transfer and convey the remaining
 two-thirds of the share to which such nephew would have
 been entitled had he survived, and after the death or re-
 marriage of such widow, the retained one-third share, to-
 gether with all accrued and accumulated income, as is here-
 in provided for the share of the other of my said nephews.

4. If at any time herein fixed for distribution of all or
 any part of my Trust Estate, neither of my said nephews,
 Clarence G. Brown and Dean E. Brown, Jr., should be
 living, and the issue of both of them should be extinct, my
 said Trustees shall thereupon set over, assign, transfer and
 convey the entire corpus of my Trust Estate, together with
 all accrued and accumulated income, unto the Trustees
 of the Alonzo O. Bliss Properties, as an addition to the
 said Trust, provided, however, that so long as the widow
 of either of my said nephews shall survive, this shall not
 operate to terminate the provision hereinbefore made for
 her or their benefit.

5. I hereby authorize and empower my aforesaid wife,
 Edith Bennie Bliss, to designate and appoint another per-
 son to serve as Co-Trustee with James McD. Shea and
 the National Savings and Trust Company in the adminis-
 tration of the Trusts hereby created, should she con-
 sider it desirable to have a third Trustee. I also authorize
 and empower my said wife to designate another Trustee
 to serve in the place and stead of any Trustee of these
 Trusts who may die, resign, or for any other reason may
 cease to serve as Trustee.

ITEM FOUR. I nominate, constitute and appoint my friend, James McD. Shea and the National Savings and Trust Company, of the District of Columbia, or its successor

Executors of this my last Will and Testament, and
8 I request that neither of them be required to give bond, undertaking or security of any kind conditional for the faithful performance of their duties as such.

For the purpose of properly administering my estate, I hereby authorize and empower my said Executors and my Trustees, aforesaid or the survivor thereof, or their successor or successors, in their or its absolute discretion, to sell any part or all my estate and property, and in consummation of such sale or sales, to convey, assign, transfer and deliver the property sold in fee simple and in absolute estate, unto the purchaser or purchasers thereof, who shall be under no obligation to see to the proper application of the purchase money.

IN WITNESS WHEREOF, I now subscribe my name to this my last Will and Testament at Washington, D. C., this 16th day of May, 1949.

(S) ARTHUR L. BLISS

Signed, published and declared as his last Will and Testament by the said Arthur L. Bliss, in the presence of us, who in his presence and at his request and in the presence of each other have hereunto subscribed our names as witnesses.

(S) HERMAN G. LAUTEN

Washington, D. C.

(S) ANNA B. CLAGETT

Washington, D. C.

(S) AUDREY JANE DORSEY

Washington, D. C.

* * * * *

Answer of Katherine B. Richardson

1. Defendant admits the allegations of paragraphs 1, 2 and 3 and, being without knowledge, neither admits nor

denies the allegations of the remaining paragraphs of said complaint.

2. Further answering, defendant admits the jurisdiction of this court to pass upon the important legal questions raised by paragraphs 5, 6, 7 and 8.

JOHN H. PRATT

John H. Pratt

905 American Security Building
Washington 5, D. C.

Attorney for

Katherine Brown Richardson

* * * * *

16 Filed Feb. 23, 1955

Plaintiff's Motion for Summary Judgment

COMES Now the Plaintiff by his attorneys and moves the Court for Summary Judgment on the ground that the pleadings raise no genuine issue of a material fact, and that Plaintiff is entitled to Judgment as a matter of law.

/s/ LEE C. ROBINSON

Suite 212, 150 S. E. 3rd Ave.,
Miami, Florida

/s/ SCOTT P. CRAMPTON

934 Bowen Building
Washington, D. C.

Attorneys for Plaintiff

* * * * *

17 Filed March 24, 1955

Answer of Minor Defendants

The answer of Kingman Brown, Dean E. Brown III, and Travis Brown to the Complaint for Declaratory Judgment filed herein, respectfully shows to the Court as follows:

1. That Kingman Brown, Dean E. Brown III, and Travis Brown are infants under the age of twenty-one years and

therefore can neither admit nor deny the allegations of said Complaint but submit their interests to the protection of this Court.

KINGMAN BROWN
DEAN E. BROWN, III
TRAVIS BROWN

By RICHARD L. WALSH
Richard L. Walsh
Guardian ad Litem

Preliminary Report of Guardian Ad Litem

Richard L. Walsh respectfully shows to the Court as follows:

1. He was appointed guardian ad litem of Kingman Brown, Dean E. Brown III, and Travis Brown, minors, by order entered the 10th day of February, 1955.

2. He has examined the pleadings herein, conferred with Scott P. Crampton, Esq., attorney for plaintiff, Louis M. Denit, Esq., and John E. Powell, Esq., attorneys for other defendants, and studied the law applicable to the questions and issues raised by the Complaint for Declaratory Judgment.

18 3. As a result of the foregoing, it is this guardian ad litem's opinion that the best interests of the minor defendants require him to join with the other defendants in defending this suit. Therefore he will join in opposing Plaintiff's motion for summary judgment filed herein and support the motion for security for costs and motion to dismiss filed herein by attorneys for other defendants.

RICHARD L. WALSH
Richard L. Walsh, Guardian ad Litem
1366 National Press Building,
Washington 4, D. C.

* * * * *

Filed April 15, 1955

Answer of Defendants, James McD. Shea, and National Savings and Trust Company, as Executors and Trustees Named in the Will of Arthur L. Bliss, Deceased, Edith Bennie Bliss, Clarence G. Brown, Helen Brown, Dean E. Brown, Jr., Allison Brown, Mrs. Marcia B. Lay, and National Savings and Trust Company as Trustee of the Alonzo O. Bliss Properties

FIRST DEFENSE

The complaint fails to state a claim upon which relief may be granted, is prematurely brought, and the plaintiff has no present interest so as to entitle him to maintain this action.

SECOND DEFENSE

1. The allegations of said paragraph are admitted.
2. The allegations of said paragraph are admitted.

Further answering said paragraph, these defendants state that Edith Bennie Bliss was lawfully married unto the said Arthur L. Bliss on, to-wit, the 24th day of September, 1926, and at the date of his death was fifty-eight years of age. The testator together with Marcia Bliss Lay and Bertha Bliss Brown were children of Alonzo O. Bliss by his wife, Catherine Emma Kingman Bliss. Said Bertha Bliss Brown predeceased the testator, leaving her surviving as her only heirs-at-law and next-of-kin the defendants Clarence G. Brown, Dean E. Brown, Jr., and Katherine B.

Richardson. Said Clarence G. Brown was born on the 20 29th day of March, 1909. He was lawfully married unto the defendant Helen S. Brown, born October 22, 1913, and as a result of said marriage, the defendant Kingman K. Brown was born on October 25, 1938. The defendant Dean E. Brown, Jr., was born on the 24th day of July, 1911. He was married unto the defendant Allison T. Brown, born February 5, 1914, and as a result of said marriage, Dean E. Brown, III was born September 14, 1940,

and defendant Travis Brown was born October 4, 1942. Defendant Katherine B. Richardson was born on the 24th day of December, 1913. All of said defendants were in being when the testator died.

3. The allegations of said paragraph are admitted.

4. Defendants admit that according to the petition for probate said Arthur L. Bliss was possessed of personal property of the approximate value of One hundred eighty-six thousand dollars (\$186,000.00). The remaining allegations of said paragraph are denied.

5. The allegations of said paragraph are denied.

6. The allegations of said paragraph are denied.

7. The allegations of said paragraph are denied.

8. The allegations of said paragraph are denied.

Further answering said complaint, these defendants state that the provisions of the will create separate and independent interests which are lawful and which do not, in any wise, violate the rule against perpetuities. By his will, the testator clearly manifests an intention and purpose to disinherit plaintiff, and to provide that he take nothing from the testator's estate. Plaintiff was the only child of Alonzo O. Bliss by his wife Eva Jackson Bliss, and, therefore, was the testator's half-brother. For many years prior to the death of testator, his relations with his said half-brother were anything but pleasant or cordial, testator having been the target of frequent attack and criticism by the plaintiff. On the other hand, the testator was devoted to his wife and entertained a genuine affection for

his nephews, sons of his deceased sister. The bulk
21 of the testator's estate consisted of bonds of Bliss Properties, acquired through his father, and his will plainly shows a purpose and intention to maintain ownership in his side of the family. This purpose and intention

being evident, the same should be carried into effect and the will declared valid.

BRANDENBURG & BRANDENBURG

By LOUIS M. DENIT

719 15th Street, N. W.

DRURY, LYNHAM & POWELL

By JOE E. POWELL

Colorado Building

Attorneys for Defendants

* * * * *

22

Filed April 15, 1955

Motion for Judgment on the Pleadings

Come now the defendants, James McD. Shea and National Savings and Trust Company, as Executors and Trustees named in the will of Arthur L. Bliss, deceased, Edith Bennie Bliss, Clarence G. Brown, Helen Brown, Dean E. Brown, Jr., Allison Brown, Marcia B. Lay, and National Savings and Trust Company as Trustee of the Alonzo O. Bliss Properties, by their attorneys, and move the Court for the entry of judgment in their favor on the pleadings, pursuant to Rule 12 of the Federal Rules of Civil Procedure, upon the following grounds:

1. The complaint fails to state a claim upon which relief may be granted.
2. The action is prematurely brought.
3. The provisions of the will are separable and create separate and independent interests which are lawful.
4. Plaintiff has no present interest, may never have any and is without right to maintain this action.

BRANDENBURG & BRANDENBURG

By LOUIS M. DENIT

719 15th Street, N. W.

DRURY, LYNHAM & POWELL

By JOE E. POWELL

Colorado Building

Attorneys for Defendants

* * * * *

25

Filed June 8, 1955

**Order Denying Plaintiff's Motion for Summary Judgment
and Granting Defendants' Motion for Judgment on the
Pleadings**

Upon consideration of the motion for summary judgment filed herein by plaintiff and the motion for judgment on the pleadings filed herein by defendants James McD. Shea and National Savings and Trust Company, as executors and trustees under the will of Arthur L. Bliss, deceased, Edith Bennie Bliss, Clarence G. Brown, Helen Brown, Dean E. Brown, Jr., Allison Brown, Marcia B. Lay, and National Savings and Trust Company as trustee of Alonzo O. Bliss Properties, and upon consideration of the complaint, the answers of the adult defendants, and the answer of the minor defendants Kingman Brown, Dean E. Brown, III, and Travis Brown filed herein by Richard L. Walsh, guardian ad litem, and the preliminary report of said guardian ad litem, and after consideration of the arguments of counsel heard in open court and the memoranda of law filed herein on behalf of the various parties, it is by the Court this 8th day of June, 1955,

ADJUDGED AND ORDERED, as follows:

1. That the equitable life estate created by the terms of paragraph 2, Item Three, of the will of Arthur L. Bliss dated May 16, 1949, and the remainders to Clarence G. Brown, and Dean E. Brown, Jr. created by the first thirteen lines of paragraph 3 of said Item Three are
26 valid testamentary dispositions and would be and remain valid even if the interests created by the subsequent provisions of said Item Three should be held to be wholly or in part invalid, it being hereby expressly declared that this order does not determine, and shall not be construed as determining, in any manner the validity or invalidity of the interests created by subparagraphs (a) and (b) of paragraph 3 and by paragraph 4 of Item Three of said will.

2. That the motion of the plaintiff Alonzo O. Bliss, Jr. for summary judgment be and the same hereby is denied.

3. That the motion for judgment on the pleadings filed herein by the defendants James McD. Shea and National Savings and Trust Company, as executors and trustees under the will of Arthur L. Bliss, deceased, et al., be and the same hereby is granted, and that the complaint for declaratory judgment filed herein by plaintiff Alonzo O. Bliss, Jr., be and the same hereby is dismissed.

By the Court:

BURNITA SHELTON MATTHEWS

Judge

* * * * *

32

Civil Docket

* * * * *

Date	Account	Rec'd	Disb'd
1955			
Jan. 11	Crampton	10.00	
Mar. 31	U. S. Treas.		10.00
June 30	Crampton (U. S. Treas.)	5.00	5.00

33

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Date	Proceedings	Fees	Total
1955	Deposit for cost by		
Jan. 11	Complaint, appearance, Exhibit. filed.		
" 11	Summons, copies (9) and copies (9) of Complaint issued Defts: 1, 2, 3, 4, 5, 7, 11, 12, & 13. 1 & 7 ser. 1-19; 4 & 5 ser, 1-17; 2 & 13 ser, 1-12; 3 & 11 ser. 1-11; #12 N, F, 2-1-55.		
Jan. 19	Answer of deft. #11 to complt; c/m 1-19-55; app. John H. Pratt. & custodian		

- Jan. 25 Summons, copy (1) & copy (1) of complt. to #6.
ser. 1-27-55.
- Jan. 25 Summons, copies (3) & copies (3) of complt. to 8,
9, 10. all ser. 1-29-55. (Md.)
- Feb. 2 Summons, copy (1) & copy (1) of complt. to #12.
ser. 2-10-55.
- Feb. 4 Motion of pltf. for appointment of guardian ad
litem & for order dispensing with production in
Court of minors; P & A. filed
- Feb. 10 Order dispensing with appearance of minors in
Court & appointing Richard L. Walsh as guardian
ad litem for Kingman Brown, Dean E. Brown, III
& Travis Brown, minors. Keech, J. (N)
- Feb. 18 Motion of defts. 1, 2, 3, 4, 5, 7, 8, 12 & 13 for
security for costs; P & A; appearance of Branden-
burg & Brandenburg & Drury, Lynham & Powell.
filed
- Feb. 18 Motion of defts 1, 2, 3, 4, 5, 7, 8, 12 & 13 to dismiss
complt; P & A; c/m 2-16-55. M.C. 3-1-55. filed
- Feb. 23 Motion of pltf. for summary judgment; c/m 2-
23-55; P & A; & in opposition to deft's motion to
dismiss; M.C. 2-23-55. "
- Mar. 24 Answer of minor defts. & report of Richard L.
Walsh, guardian ad litem; c/m 3-22-55. "
- Apr. 7 Transcript of testimony 3-25-55; Robert I. Thiel. "
- Apr. 15 Answer of defts. 1, 2, 3, 4, 5, 7, 8, 12 & 13 to complt;
c/m 4-15-55. "
- Apr. 15 Calendared (N)
- Apr. 15 Motion of defts. 1, 2, 3, 4, 5, 7, 8, 12 & 13 for judg-
ment of pleadings; P&A; c/m 4-14-55. "
- Apr. 28 Memo of pltf. to complete argument at hearing
on 4-18-55. "
- May 24 Memo of defts. 1, 2, 3, 4, 5, 7, 8, 12 & 13; c/m
5-23-55. "
- June 8 Order denying pltf's motion for summary judg-
ment & granting deft's motion for judgment on the
pleadings & that complt. for declaratory judgment
is dismissed. Matthews, J.(N)

BRIEF FOR APPELLEES

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,828

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED OCT 9 1955

ALONZO O. BLISS, *Appellant*,

v.

Frederic W. Stewart

CLERK

JAMES McD. SHEA and NATIONAL SAVINGS AND TRUST COM-
PANY, as Executors and Trustees, EDITH BENNIE BLISS,
et al. Appellees.

On Appeal from the United States District Court for the
District of Columbia

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**APPELLEES' COUNTERSTATEMENT OF QUESTIONS
PRESENTED**

When testator's will bequeaths and devises his estate to trustees, in trust to pay the net income to testator's widow during her life, and, upon her death, to divide the corpus between two designated nephews of testator, with remainders over in the event either or both of the nephews should predecease the widow, are the life interest of the widow and the remainder interests of the nephews valid and separable provisions, the widow and the nephews having survived testator and being now alive?

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,828

ALONZO O. BLISS, *Appellant*,

v.

JAMES McD. SHEA and NATIONAL SAVINGS AND TRUST COMPANY, as Executors and Trustees, EDITH BENNIE BLISS, *et al. Appellees.*

On Appeal from the United States District Court for the
District of Columbia

BRIEF FOR APPELLEES

COUNTER-STATEMENT OF THE CASE

Arthur L. Bliss, late a citizen of the United States and a resident of the District of Columbia, died on May 27, 1953, (Jt. App. 1-12). He left a will dated May 16, 1949, (Jt. App. 3-13), in which appellees, James McD. Shea and National Savings and Trust Company were named as Executors and Trustees. (Jt. App. 5-9).

On January 11, 1955, Alonzo O. Bliss, Jr., a half-brother of the testator, filed a civil action in the Court below, seeking a judgment that Item Three of said will is null and void and that the property which purports to be disposed of thereby is distributable forthwith to the heirs-at-law and next-of-kin of said Arthur L. Bliss as intestate property of the latter. (Jt. App. 2-4) The Executors and Trustees named in the will, Edith Bennie Bliss, testator's widow; Clarence G. Brown, nephew, his wife Helen Brown, and their minor child, Kingman Brown; Dean E. Brown, Jr., nephew, his wife Allison Brown, and their minor children Dean E. Brown III and Travis Brown; Katherine B. Richardson, niece; and Marsha B. Lay, sister of testator, were named as defendants. (Jt. App. 1)

Katherine B. Richardson filed an answer by which she admitted the allegations of paragraphs 1, 2, and 3 and, asserting that she was without knowledge with reference thereto, neither admitted nor denied the remaining allegations. (Jt. App. 9, 10) The Executors and Trustees and all of the remaining adult defendants filed a joint answer, in which they challenged the sufficiency of the complaint, asserted that the action was premature, and denied plaintiff's right to maintain it (Jt. App. 12); they also averred that the testator was lawfully married unto Edith Bennie Bliss on September 24, 1926, and at the date of his death was fifty-eight years of age; that the testator, together with Marsha B. Lay, and Bertha Bliss Brown, were children of Alonzo O. Bliss by his wife Catherine Emma Kingman Bliss; that Bertha Bliss Brown predeceased testator, leaving her surviving as her only heirs-at-law and next-of-kin the defendants, Clarence G. Brown, Dean E. Brown, Jr., and Katherine B. Richardson; that Clarence G. Brown was born on March 29, 1909, was married unto said Helen S. Brown, born on October 22, 1913, and as a result of said marriage, the defendant Kingman K. Brown was born on October 25, 1938; that Dean E. Brown, Jr., was born on July 24, 1911, was married to said Allison T. Brown,

born on February 5, 1914, and as a result of said marriage, Dean E. Brown, III, was born on September 14, 1940, and Travis Brown was born on October 4, 1942; that Katherine B. Richardson was born December 24, 1913, and that all of said defendants were in being when the testator died. (Jt. App. 12-13). Appellees further averred that, for many years prior to his death, testator's relations with his half-brother, appellant here, were anything but cordial or pleasant, testator having been the target of frequent attack and criticism by appellant; that, on the other hand, testator was devoted to his wife and entertained a genuine affection for his nephews, sons of his deceased sister; that the bulk of testator's estate consisted of bonds of Bliss Properties acquired from his father and that his will plainly shows a purpose and intention to maintain ownership in his side of the family; that the provisions of the will created separate and independent interests which are lawful and do not in any wise violate the rule against perpetuities, and testator's purpose and intention should be carried into effect and the will declared valid. (Jt. App. 13-14)

Appellant did not raise any issues of fact, but moved for summary judgment. (Jt. App. 10) These appellees moved for judgment on the pleadings, relying upon four grounds, (1) that the complaint failed to state a claim upon which relief might be granted; (2) that the action was prematurely brought; (3) that the provisions of the will are separable and create separate and independent interests which are lawful, and (4) plaintiff was without right to maintain the action. (Jt. App. 14) The infant defendants, through their Guardian ad litem, joined with these appellees in opposing plaintiff's motion and supported the motion of these appellees (Jt. App. 10, 11)

The Trial Court denied plaintiff's motion for summary judgment, granted the motion of these appellees and entered a decree sustaining as valid the equitable life estate created by the terms of paragraph 2 of Item Three

of the will and the remainders to Clarence G. Brown and Dean E. Brown, Jr., created by the first thirteen lines of paragraph 3 of said Item Three, expressly declaring that said decree "does not determine, and shall not be construed as determining, in any manner the validity or invalidity of the interests created by subparagraphs (a) and (b) of paragraph 3 and by paragraph 4 of Item Three of said will." (Jt. App. 15-16) From such decree this appeal is prosecuted.

SUMMARY OF ARGUMENT

These appellees contend (1) that the equitable life estate in testator's widow and the vested remainders in his nephews are separable and independent interests which are lawful; (2) that this action was prematurely brought; and (3) that the decree of the Trial Court was in all respects right and proper upon the pleadings before it.

ARGUMENT

Separate Interests Created by Item Three

By Item Three of his will testator devised his residuary estate unto James McD. Shea and the National Savings and Trust Company, or the survivor of them, in and upon certain trusts. After conferring broad powers with respect to the handling and management of the trust estate in paragraph 1, he directed said Trustees as follows:

"2. To pay over from time to time the net amount of rents, interest and income produced by the Trust Fund hereby established unto my wife Edith Bennie Bliss during her natural life.

3. Upon the death of my said wife, Edith Bennie Bliss, the Trust hereby established shall terminate, and my said Trustees shall thereupon set over, assign, transfer and convey the corpus thereof, together with all accrued and accumulated income, in absolute estate and in fee simple, one-half thereof unto my nephew, Clarence G. Brown, and one-half thereof unto my

nephew, Dean E. Brown, Jr.; PROVIDED, HOWEVER, should either of my said nephews die prior to the time therein fixed for the termination of this Trust, leaving neither issue nor widow who shall survive the termination of this Trust, my said Trustees shall thereupon set over, assign, transfer and convey the entire corpus thereof, together with all accrued and accumulated income, in absolute estate and in fee simple, unto the other of them."

In subparagraphs (a) and (b) there are limitations over in case either or both nephews predecease the time fixed for termination of the trust. The Court below made no ruling concerning the validity or invalidity of these limitations but concluded that the provisions quoted above created (a) an equitable life estate in testator's widow, and (b) remainders in his nephews, which would be valid even if the interests created by the subsequent provisions should be held to be wholly or in part invalid. (Jt. App. 15)

With respect to the interests of Mrs. Bliss, there can be no question that it is an equitable life estate. This is apparently conceded by appellant, his contention being that the interest should fail because, forsooth, the language creating it happens to be part of Item Three.

Concerning the estates devised to testator's nephews appellant makes the same argument, it being claimed also that such estates are contingent remainders. We submit that both contentions are untenable. The dominant, primary purpose of the testator was to provide for his widow. That is palpably clear. After such provision, his interest centered upon his nephews, children of a deceased sister. (Jt. App. 13). The bulk of testator's estate consisted of bonds of Bliss Properties acquired from his father. (Jt. App. 13) The provision for his nephews is a definite indication of his purpose and intention to maintain ownership of such bonds on his side of the family. Effectuation of that intention does not depend upon validity of the other limitations over.

In *Landram v. Jordan*, 203 U.S. 56, 63; 51 L. ed. 88, 90, the Court, through Justice Holmes, said:

“It would be a strong thing to say that we gather from this will an intent that, if the trust so far as it concerns the testator’s descendants should fail because they prefer to take the property by intestacy free from the limitations of the will, therefore the one gift outside his family should be defeated also. The trust is not a metaphysical entity or a Prince Rupert’s drop which flies to pieces if broken in any part. It is a provision to benefit descendants and a niece. There is no general principle by which the benefits must stand or fall together. It is true that all the Washington property was given to the trustees in one clause, and that a part of the scheme in favor of the testator’s grandchildren was the creation of a fund from the rents. But, as is stated in Item 21, 611 M Street was excepted from the scheme, and the whole income of this lot, or, in other words, an equitable estate in the specified rent, is given to Gabriella Jordan for life by Item 6. If that were all we see no reason for a doubt that the gift would be good, whether the gift to the other beneficiaries were good or not. The fact that the testator’s daughter takes all the rest of the property, instead of her children getting a postponed interest in a part, is no ground for denying to the niece the life estate given to her in an identified and excepted piece of land. It does not make the case any worse than a part of the property thus going to the testator’s daughter is the remainder in the estate given to his niece.”

In *Hazen v. American Security & Trust Company*, 49 App. D. C., 297, 300; 265 F. 447, 450, this Court said:

“A reading of the paragraph of the will under consideration irresistibly leads to the conclusion that the special objects of the testator’s bounty were Mrs. Duffey, referred to as his adopted daughter, and her children. There is no reason to assume that the testator intended his provision for these special objects of his solicitude to be dependent upon the remote interests thereafter devised. The language used indicates exactly the opposite, and, as the Supreme Court

has declared that to be the test, we see no occasion to prolong this discussion."

See also 28 A.L.R. 376, 386

75 A.L.R. 124

168 A.L.R. 323

By every test with which we are familiar, the estates of the nephews are vested remainders. They fall within the definition at common law, being limitations to definite and certain persons upon a definite and certain event. They fit squarely into the definition of such estates set forth in Sections 45-810, 811 and 812 of the District of Columbia Code, 1951 Edition. The life estate of Mrs. Bliss constitutes the "precedent estate" and the interests of the nephews commence upon the full expiration of such precedent estate. Their interests are, therefore, remainders. Since they were in being at testator's death, and were given an immediate right to the trust estate upon the expiration of the precedent estate, that is, the equitable life estate of Mrs. Bliss, their interests are vested remainders. *O'Neill v. District of Columbia*, 77 U.S. App. D.C. 79, 132 F. 2d 601; *District of Columbia v. Clark*, 84 U.S. App. D.C. 88, 175 F. 2d 821. There is nothing in the will indicating that the life estate of the widow or the remainders to the nephews are bound together with the other limitations over, so that the failure of such other limitations, if declared invalid, would cause this life estate and these remainders to fall. Indeed, any such interpretation would defeat the testator's intention apparent upon the face of the will. Under such circumstances, there would seem to be neither reason nor necessity for attempting to ascertain at this time the nature and extent of such limitations. This is the plain mandate of this Court in the Hazen case, *supra*.

Action Premature

Separable and successive estates are created by the will which are valid. They are vested. Accordingly, it would serve no useful purpose for the Court to determine what

might happen in the event that both nephews predeceased testator's widow, and plaintiff was in no situation to call upon the Court to declare the fate of limitations over.

In *Cross v. Del Valle*, 1 Wall (U.S.) 5, 17 L. ed. 515, one of the principal questions involved was whether an equitable life estate given to Maria Del Valle was void because she was an alien, so that the remainder interests could be hastened in enjoyment. The Court said: (p. 519)

"A remainder-man may have a decree to protect the estate from waste, and have it so secured by the trustee as to protect his estate in expectancy. The court will interfere under all needful circumstances to protect his rights, but such cases do not come within the category of mere declaratory decrees as to future rights.

"There is also a class of cases in which recommendations or requests in a will to a devisee or legatee have been construed as cutting down an absolute fee into an estate for life, with an equitable remainder to the person indicated by the testator in his request. In such cases the court will entertain a bill during the life of the first taker to have the right of the claimant in remainder established. Nor do these cases infringe upon the doctrine we have stated as to mere declaratory decrees concerning future contingent executory estates.

"But there is a class of cases which are exceptions to this rule, and being exceptional, only tend to prove the rule. The New York cases of *Lorillard v. Coster*, 5 Paige, 172, and *Hawley v. James*, are of this character. There the bills were filed by the executors or trustees for their protection, and that they might have a construction of the will, and the direction of the court as to the disposition of property. In such cases, from necessity, and in order to protect the trustee, the courts are compelled to settle questions as to the validity and effect of contingent limitations in a will, even to persons not *in esse*, in order to make a final decree and give proper instructions in relation to the execution of the trusts. *Bowers v. Smith*, 10 Paige, 200. It is this necessity alone which compels

a court to make such cases exceptions to the general rule. But in the present case no such necessity exists. The court is not called upon to make a scheme of the trusts, nor could they anticipate the situation of the parties in the suit, or those who may be in existence at the death of Maria Del Valle. The Court has no power to decree *in thesi*, as to the future rights of parties not before the court or *in esse*.

In the case at bar, testator's widow has a vested equitable life estate. Upon her death, the trust terminates and the trustees are directed to distribute absolutely and in fee simple to testator's nephews. They have fee simple remainders, subject only to the life estate of the widow. All three estates are vested. What may happen if the nephews or either of them, should predecease the widow is of no consequence at this time. Plaintiff has no standing to seek declaratory relief, which, in the last analysis would be a declaration *in thesi*.

The principle announced in *Cross v. Del Valle, supra*, was followed by this Court in *Hazen v. American Security & Trust Company, supra*. It seems to be universally recognized.

In *Moore v. Emery*, 137 Me. 259, 18 A. 2d 781, 787, the Court said:

"With a unanimity seldom found elsewhere in the law, courts have consistently refused during the existence of a particular estate to construe wills in order to determine future rights, and it makes no difference whether the event which may give rise to a future controversy is certain to happen, as the death of a life tenant, or depends on a state of facts which is contingent and uncertain. (Citations from a dozen jurisdictions omitted.)

"A glance at these cases will indicate the reluctance of courts to construe a will in order to decide any question which does not relate to some certain and immediate problem facing either a beneficiary or a fiduciary of an estate."

In *Wahl v. Brewer*, 80 Md. 237, 243, the Court said:

"If the appellant's theory be correct, that the character of the estate in remainder is contingent, whose rights will be concluded by any determination of the question at this time? Insofar as his rights are involved, the question is one of but small interest to him, whether it is determined now or at some future time, as it depends upon his being alive at the life tenant's death. It certainly is a purely speculative surmise which the future alone will reveal, as to who may be the proper parties in the proceeding to determine the question now sought to have passed upon. As said in the argument, 'we are contesting the question of vesting now, with the appellant, when, if he should be dead when the life-tenant dies, we may have to contest the same identical question with his descendants who are then living, and who would not be bound by any decree in this cause, as they are not parties herein'."

"It is well settled that a Court will never entertain a suit to give a construction or declare the rights of parties upon a state of facts which has not yet arisen, nor upon a matter which is future, contingent and uncertain. * * *"

In *Hawkins v. Ghent*, 154 Md. 261, 265, the Court said:

"In our opinion, the circuit court was justified in declining to decide the questions raised as to the limitations subsequent to those for the lives of children of the testatrix. All of the later limitations are contingent. It is uncertain whether any of the parties to this suit will become entitled by survivorship to a part of the income or corpus of the estate when existing life interest expire. This court has heretofore adopted the policy of refraining from the determination of future rights of parties depending upon conditions which may never exist, especially where, as in this case, there is no immediate need for such a decision. * * * When events shall have ended the uncertainties which make the secondary limitations contingent, the question of their validity may then be presented for decision by persons having a definitely ascertained interest in the inquiry, but it would

be premature now to decide such a question at the instance of parties who cannot yet claim, and may never be able to assert, the rights to be effected by the adjudication."

In re Kilmer's Will, 58 N. Y. S. 2d 646, 650, the Court said:

"The great weight of authority is to the effect that in cases where there is no immediate distribution to be made because of one or more intervening life interests, as cestui qui trust or otherwise, that it is the definitely settled policy of the law of this state to defer any construction of language contained in the instrument creating remainder interests until the actual facts are known and it becomes immediately necessary to determine any question there may be as to the qualification and identity of remaindermen. This principle appears to be particularly applicable when there is any degree of probability, or even possibility, that abiding the event might render the construction unnecessary or simplify the making of any that might eventually prove to be requisite."

In re Lockhart's Estate, 267 Pa. 390, 111 A. 254, testatrix devised and bequeathed the residue of her estate in trust and directed that the income be paid to William Gardner Crowell for life. Upon the death of William, the income was to be paid two-thirds to Wilmer Gardner Crowell and one-third to the issue of Wilmer; there were further limitations which it is unnecessary to describe.

The Court said:

"The trust created by the testatrix for William Gardner Crowell for life is clearly good, and is not to be struck down, even if the ultimate disposition of her estate does transgress the rule against perpetuities. *Whitman's Estate*, 248 Pa. 285, 93 Atl. 1062; *Ewalt v. Davenport, et al.*, 257 Pa. 385, 101 Atl. 756. The question which appellant now raises need not be discussed, for the time to raise it will be upon the death of the stepfather of the testatrix.

"The relative contentions of the parties thus summarized outline problems of considerable legal interest, but the question arises at the very threshold of inquiry as to whether they require solution at this time, in view of the fact that there is a valid outstanding life estate in appellant, with other admittedly valid limitations to follow. Appellant's theory of the case is that, if his propositions as to the validity of the subsequent estate are correct, the prior limitations, otherwise valid, must likewise fall as being merely ancillary and subordinate to the dominant intention of the testator to create a long-term, forbidden trust, and that, therefore, the question of the invalidity of the ulterior limitations must now be determined, so that it may be ascertained whether he is entitled to an immediate award of the residuary estate:

"The general doctrine is definitely opposed to this position. Ordinarily the validity of prior limitations is not affected or disturbed by reason of ultimate ones which transgress the rule against perpetuities. There is a well-nigh continuous current of authorities in Pennsylvania establishing this principle. (Citation of numerous cases omitted.)

* * *

"Since, therefore, as now held, the precedent life estates would not be affected in the present case even if the subsequent ones were to be declared invalid, there is no occasion for presently deciding whether or not such invalidity exists; such decision must wait until the necessity for it arises. This is in accordance with the uniform practice in such cases." (Citation of numerous cases omitted.)

In *United States Fidelity & Guaranty Co. v. Askew*, 183 Tenn. 209, 191 S. W. 2d 533, 534, the Court said:

"The policy of this Court, as several times declared, is that its discretion in rendering decrees under the authority of our Uniform Declaratory Judgment Act, Code, Sec. 8835 et seq. 'should be exercised with the utmost caution'. Otherwise, the courts might well be projected into the 'limitless field of advisory judgments'.

"Pursuant to that declared policy, this Court has consistently refused a declaratory judgment where the question presented is abstract, theoretical or based upon a contingency which may or may not arise." * * *

The life estate of the widow and the remainder interests of the two nephews being valid and separable, as has been demonstrated in the first part of this brief, there is no reason why the Court should pass upon the validity of subsequent interests at this time. If both of the nephews survive the widow of testator, the questions which the appellant seeks to raise will be moot and any views which the Court may have expressed will have no application. In such circumstances it is obvious that a judicial construction of the subsequent interests will be proper if and only if either of testator's nephews predeceases the widow. Until the widow's death, a judicial construction of the subsequent interests, whether it be sought by a disgruntled relative of testator or by the trustees named in testator's will, is premature.

Judgment on Pleadings Proper

Appellees were entitled to judgment on the pleadings. Rightly understood and interpreted, the cases relied upon by appellant support this conclusion. The testator never intended that appellant should share in his estate. Their relations were anything but pleasant or cordial, testator having been the target of frequent attack and criticism by appellant. (J. App. 13). On the other hand, testator was devoted to his wife and entertained a genuine affection for his nephews, children of his deceased sister. (J. App. 15). To construe the will in accordance with appellant's contentions would be to frustrate testator's clearly declared purpose, and to do the one thing he never intended should be done, namely pass a part of his estate to his half-brother.

CONCLUSION

In view of the foregoing, we respectfully submit that the judgment of the District Court is right and should be affirmed.

Respectfully submitted,

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